Recent Developments in Employment Discrimination Litigation

by Hon. John M. Roll

Employment discrimination litigation under Title VII is a distinct and colorful subspecies of federal trial practice. This article focuses upon some issues common to employment discrimination cases. The case law discussed is illustrative only. In this article, sex discrimination litigation provides the context for much of the discussion. No clear-cut answers exist for many of the issues addressed.

This article focuses upon the forms of sex discrimination and the prima facie elements of each, the liability of an employer for discriminatory practices occurring in the workplace, certain evidentiary issues frequently arising in employment discrimination cases, and the potential liability of an employer who terminates an employee due to the employee's alleged discriminatory conduct.

Title VII—In General

Title VII provides a remedy against employment discrimination based on an employee's "race, color, religion, sex or national origin." 42 U.S.C. § 2000e-2 (a).

Case law suggests that in an appropriate case, a plaintiff may be entitled to claim that discrimination arose from a combination of protected traits, resulting in a recognized subclass. *See, e.g., Lam v. University of Hawaii*, 40 F.3d 1551, 1562 (9th Cir. 1994) (Asian women constituted discrete subclass protected by Title VII).

"Employer" Under Title VII

In order to be held liable under Title VII, a person must be the employer of the alleged victim or an agent of the victim's employer. An employer for purposes of Title VII is "a person engaged in an industry affecting commerce who has 15 or more employees…and any agent of such a person…" 42 U.S.C. § 2000e (b).

When an individual works for a subsidiary or franchisee, an issue may arise as to whether the parent company or franchisor may also be considered the individual's employer. This issue may be critical to a plaintiff's case where he or she works for a franchisee or subsidiary which alone does not hire the requisite 15 employees but does if aggregated with its franchisor or parent corporation.

There are a number of tests utilized by the federal courts for determining whether an entity is an employer when two or more potential employers are involved. Under the "single-employer" test, the predominant test used in this area, two businesses are treated as one if they have: "(1) interrelation of operations, (2) common management, (3) centralized control of labor relations, and (4) common ownership or financial control." *Childs v. Local 18, Int'l Bhd. of Elec. Workers*, 719 F.2d 1379, 1382 (9th Cir. 1983) (citations omitted). Although all four factors need not be present and no one factor is controlling, some courts applying this test treat "centralized control of labor relations" as the key factor in Title VII cases. *See Lockard v. Pizza Hut, Inc.*, 162 F.3d 1062, 1069-72 (10th Cir. 1998); *Evans v. McDonald's Corp.*, 936 F.2d 1087, 1089-90 (10th Cir. 1991); *Childs*, 719 F.2d at 1382; *Trevino v. Celanese Corp.*, 701 F.2d 397, 403-05 (5th Cir. 1983).

Sex Discrimination

Title VII prohibits sex discrimination. Sex discrimination encompasses disparate treatment and sexual harassment, and sexual harassment includes hostile work environment and quid pro quo sexual harassment. *Heyne v. Caruso*, 69 F.3d 1475, 1478 (9th Cir. 1995) (citations omitted). Title VII also prohibits an employer from retaliating against an employee who opposes sex discrimination. 42 U.S.C. § 2000e-3 (a).

Hostile Work Environment

"A 'hostile work environment' occurs when there is a pattern of ongoing and persistent harassment severe enough to alter the conditions of employment." *Draper v. Coeur Rochester, Inc.*, 147 F.3d 1104, 1108 (9th Cir. 1998)(citations omitted).

In order to prove hostile work environment sexual harassment, a plaintiff must prove that 1) he or she was subjected to sexual advances, requests for sexual conduct, or other verbal or physical conduct of a sexual nature; 2) the conduct was unwelcome; 3) the conduct was sufficiently severe or pervasive so as to alter the conditions of the plaintiff's employment and create an abusive or hostile work environment; 4) the plaintiff perceived the working environment to be abusive or hostile; and 5) a reasonable woman or man in the plaintiff's circumstances would have considered the working environment to be abusive or hostile. *Fuller v. City of Oakland, California*, 47 F.3d 1522, 1527 (9th Cir. 1995).

Whether the workplace constituted a sexually hostile work environment is determined by looking at the totality of the circumstances including "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with the employee's work performance." *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993). The Ninth Circuit has adopted the "reasonable victim" standard for hostile work environment sexual harassment. *Ellison v. Brady*, 924 F.2d 872, 880 (9th Cir. 1991). *See also Stingley v. Arizona*, 796 F.Supp. 424, 428 (D. Ariz. 1992) (applying reasonable person of same race or color standard to racially hostile work environment claim).

An employer is held accountable for sexual harassment by non-supervisory employees when the employer knew or reasonably should have known it was occurring and did nothing to correct it.

Quid Pro Quo Sexual Harassment

Quid pro quo sexual harassment requires proof "that an individual 'explicitly or implicitly condition[ed] a job, a job benefit, or the absence of a job detriment, upon an employee's acceptance of sexual conduct.'" *Heyne*, 69 F.3d at 1478 (quoting *Nichols v. Frank*, 42 F.3d 503, 511 (9th Cir. 1994)).

Disparate Treatment

Disparate treatment in a sex discrimination context occurs when 1) a plaintiff was discharged, not hired, not promoted, demoted, or subjected to some other adverse action by an employer; and 2) the plaintiff's sex was a motivating factor in the employer's decision to take the adverse action against the plaintiff. *Washington v. Garrett*, 10 F.3d 1421, 1433 (9th Cir. 1993); *Estate of Reynolds v. Martin*, 985 F.2d 470, 475 n. 2 (9th Cir. 1993).

Retaliation

A right to be free from retaliation for opposing sex discrimination is a protection afforded employees under Title VII. 42 U.S.C. § 2000e-3 (a). A plaintiff may prove a prima facie case of retaliation by showing that 1) he or she engaged in or was engaging in an activity protected under Title VII, such as the filing of a complaint of sex discrimination; 2) the employer subjected the plaintiff to an adverse employment action; and 3) there was a causal link between the protected activity and the employer's action. *Yartzoff v. Thomas*, 809 F.2d 1371, 1375 (9th Cir. 1987) (citations omitted).

Liability of Employer for Sex Discrimination

Misconduct by Non-Supervisory Employees

An employer is held accountable for sexual harassment by non-supervisory employees when the employer knew or reasonably should have known it was occurring and did nothing to correct it. *Burrell v. Star Nursery, Inc.*, 170 F.3d 951, 955 (9th Cir. 1999); *Mockler v. Multnomah County*, 140 F.3d 808, 812 (9th Cir. 1998).

Management-Level Employees' Knowledge Imputed to Employer. For purposes of the employer's requisite knowledge of misconduct by non-supervisory employees, it is sufficient that management-level employees knew or reasonably should have known that the harassment was occurring. *Ellison*, 924 F.2d at 881 (citing *EEOC v. Hacienda Hotel*, 881 F.2d 1504, 1515-16 (9th Cir. 1989)). A management-level employee is a person with authority to hire, promote, discharge or discipline an employee, or participate in recommending such action. *Miller v. Bank of America*, 600 F.2d 211, 213 (9th Cir. 1979). *See, e.g., Distasio v. Perkin Elmer Corp.*, 157 F.3d 55, 64 (2nd Cir. 1998)("[A]n official's knowledge will be imputed to an employer when: (A) the official is at a sufficiently high level in the company's management hierarchy to qualify as a proxy for the company; or (B) the official is charged with a duty to act on the knowledge

and stop the harassment; or (C) the official is charged with a duty to inform the company of the harassment.") (citations omitted).

Sufficiency of Employer's Remedial Action. Whether an employer took sufficient curative action to arrest a discriminatory practice by a non-supervisory employee is frequently presented in Title VII litigation. *See, e.g., Mockler*, 140 F.3d at 813-14 (defendant's deviation from employer's normal investigation procedure, failure to interview persons who observed the misconduct, and one-day suspension of harasser without pay but allowing him to recoup lost wages by working overtime, did not stop harassment and constituted evidence of insufficient remedial action). "The reasonableness and adequacy of the remedy depends upon its ability to stop the individual harasser from continuing to engage in such conduct and to discourage other potential harassers from engaging in similar unlawful conduct." *Mockler*, 140 F.3d at 813 (citations omitted). "Once an employer knows or should know of the harassment, a remedial obligation kicks in." *Fuller*, 47 F.3d at 1528. Therefore, if "1) no remedy is undertaken, or 2) the remedy attempted is ineffectual, liability will attach." *Fuller*, 47 F.3d at 1528-1529.

Certain responses, such as holding a meeting at which misconduct is denounced, and circulating a notice, to be signed by every employee, disapproving of the misconduct and warning of consequences, may be sufficient. *Chaboya v. American Nat'l Red Cross*, 72 F.Supp.2d 1081, 1084 (D. Ariz. 1999). Issues may arise as to the adequacy of curative measures where an employee who complained of discrimination was never notified that certain curative steps were taken by management. *Chaboya*, 72 F.Supp.2d at 1091.

Misconduct by Supervisory Employees

Agency principles are relevant in determining when an employer is liable for sexual harassment by supervisors. *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 72 (1986) (circuit court erred in concluding that, regardless of the circumstances, employers are absolutely liable for misconduct of supervisors).

Until 1998, an employer could be held liable for hostile work environment sexual harassment only where management-level employees "knew or should have known" of the hostile work environment and did nothing to correct it. This rule still applies to sexual harassment committed by non-supervisory employees. The *Ellerth-Faragher* standard is now controlling law as to sexual harassment by supervisors.

The *Ellerth-Faragher* standard arose from *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998) and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998). In these cases, the United States Supreme Court set forth a new standard for vicarious liability when a hostile work environment is created by a supervisor. Under this new standard, when an employee demonstrates that 1) he or she was subjected to a hostile work environment by a supervisor, and 2) suffered a tangible employment action, the employer is vicariously liable. *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 808.

If the employee has not suffered a tangible employment action, the employer may rely upon a two-part affirmative defense to shield itself from liability. *Id.* The two-part affirmative defense requires proof that 1)"the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior," and 2)"the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." *Id.*

Some of the same questions raised under the previous standard continue under the new *Ellerth-Faragher* standard, such as whether the plaintiff was exposed to a hostile work environment and whether the employer took prompt action to correct the harassment (if the affirmative defense applies). However, the new standard raises some additional questions.

Status as Supervisor. "Supervisor" is not defined under this standard. Whether the harasser must be in the plaintiff's "chain of command" or could merely be someone that the plaintiff believed possessed supervisory authority over him or her is unclear. *See, e.g., Durham Life Ins. Co. v. Evans*, 166 F.3d 139, 154-55 (3rd Cir. 1999) (individual two levels above plaintiff on corporate chart and who was one of three persons who decided to persuade plaintiff's supervisor to take a tangible employment action against her was a "supervisor" under the *Ellerth/Faragher* standard).

Tangible Employment Action. Also unclear is what constitutes a "tangible employment action." According to *Ellerth*, "[a] tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Ellerth*, 524 U.S. at 761. *See, e.g., Durham Life Ins. Co.*, 166 F.3d at 153-54 (3rd Cir. 1999) (loss of office, dismissal of secretary, assignment of lapsed policies and missing files leading to fifty percent decrease in pay amounted to a "tangible employment action"). *But see Reinhold v. Virginia*, 151 F.3d 172, 175 (4th Cir. 1998) (assignment of extra work not a tangible employment action).

Until 1998, an employer could be held liable for hostile work environment sexual harassment only where management-level employees "knew or should have known" of the hostile work environment and did nothing to correct it.

"A tangible employment action in most cases inflicts direct economic harm" and "requires an official act of the enterprise, a company act." *Ellerth*, 524 U.S. at 762. "As a general proposition, only a supervisor, or person acting with the authority of the company, can cause this sort of injury." *Id.*

Whether an employee's constructive discharge constitutes a tangible employment action is unsettled in Ninth Circuit published case law. *See, e.g., Montero v. Agco Corp.*, 192 F.3d 856, 861 (9th Cir. 1999) ("[W]e need not decide whether a constructive discharge can be a 'tangible employment action' for the purpose of a *Faragher* analysis, because Plaintiff was not constructively discharged."). The Second Circuit has concluded that constructive discharge is not a tangible employment action, in part because even co-workers may be responsible for a constructive discharge and a constructive discharge is neither ratified nor approved by management. *Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283, 294 (2nd Cir. 1999) ("Constructive discharge does not constitute a 'tangible employment action,' as that term is used in *Ellerth* and *Faragher*.").

Adequacy of Employer's Anti-Harassment Policy. In establishing the first element of the affirmative defense, proof that the employer had an anti-harassment policy "suitable to the employment circumstances" at the time of the alleged harassment may be sufficient. *Faragher*, 524 U.S. at 807. However, this policy must be effective. The adequacy of an employer's anti-harassment policy may depend on the scope of its dissemination and the relationship between the persons designated to receive employee complaints and the alleged harasser. *See, e.g., Faragher*, 524 U.S. at 808 (policy held ineffective where 1) the policy was not widely disseminated to all branches of the municipal employer and 2) the policy did not include any mechanism by which an employee could bypass the harassing supervisor when lodging a complaint).

Reasonableness of Plaintiff's Failure to Utilize Available Corrective or Preventive Measures. A showing by the defendant that the plaintiff unreasonably failed to use any complaint procedure provided by the defendant will normally suffice to satisfy the second prong of the affirmative defense. *Faragher*, 524 U.S. at 807-08. The reasonableness of the plaintiff's failure to utilize corrective measures will depend upon the individual circumstances of each case. *See, e.g., Dedner v. Oklahoma*, 42 F.Supp.2d 1254, 1260 (E.D. Okla. 1999) (plaintiff's belief that other employees had used the complaint procedure to no avail was unreasonable and therefore her failure to use the complaint procedure was not excused).

Evidentiary Issues Regarding Discrimination

Unreported Conduct Against Plaintiff—Perceived Futility

A plaintiff may seek to admit evidence of misconduct against him or her which the plaintiff did not report to management. The fact that misconduct went unreported may be relevant as to whether management knew or should have known of the misconduct. *Distasio*, 157 F.3d at 64. However, when a plaintiff fails to report misconduct because of a belief that further reporting would be futile in light of the failure of the employer to take adequate steps in the face of prior complaints, or because the plaintiff is threatened by the employer, such evidence may yet be imputed to management. *See, e.g., Distasio*, 157 F.3d at 64-65 (district court erred in failing to consider unreported misconduct where employer could be held liable for this conduct if plaintiff's failure to report was reasonably caused by supervisor's demand to keep silent).

Plaintiff's Post-employment Awareness of Harassment Committed Against Other Employees

After leaving the defendant company's employ, a plaintiff may learn of other acts of sexual harassment involving other employees. Such evidence may be admissible. *See, e.g., Hurley v. Atlantic City Police Dep't*, 174 F.3d 95, 111 (3rd Cir. 1999) (although plaintiff was unaware of the misconduct until after filing suit, evidence of misconduct against other employees was relevant to show motive and that employer knew or should have known that sexual harassment was occurring); *Perry v. Ethan Allen, Inc.*, 115 F.3d 143, 150-51 (2nd Cir. 1997) (although evidence of sexual harassment not witnessed personally by plaintiff was relevant to show existence of hostile work environment and probative of employer's notice of that environment, exclusion of this evidence was harmless). *But see Biggs v. Nicewonger Co., Inc.*, 897 F.Supp. 483, 485 (D. Or. 1995) ("Evidence relating to alleged incidents of sexual harassment not witnessed by [the plaintiff] or not related to her while she was on the job [is] not relevant to prove a hostile work environment in this case.").

Conduct Occurring in Different Departments of the Same Company

Misconduct occurring in a different department of the same company may be admissible in order to demonstrate the defendant's alleged tolerance of such conduct. *Mooney v. Aramco Serv. Co.*, 54 F.3d 1207, 1221 (5th Cir. 1995) (acts in other departments in worldwide company ruled inadmissible). *But see Woods v. Graphic Communications*, 925 F.2d 1195, 1202 (9th Cir. 1991) (racially charged atmosphere throughout plant, including other work areas, admissible).

Conduct Occurring at Subsidiaries of Defendant

A plaintiff may seek to offer evidence of discriminatory conduct at a related but different facility to demonstrate that a hostile work environment permeates a company. *See Mooney, supra*.

Admissibility of Other Forms of Discrimination

A plaintiff may seek to introduce evidence of one form of discrimination in a case involving another form of discrimination, for instance, evidence of race discrimination in a sex discrimination case. This evidence may be admissible if the plaintiff is a member of a distinct protected subclass. *See, e.g., Lam*, 40 F.3d at 1562. However, evidence of other forms of discrimination unrelated to the discrimination complained of by the plaintiff would appear to be inadmissible. *See, e.g., Kun v. Finnegan, Henderson, Farabow, Garrett & Dunner*, 949 F.Supp. 13, 19 (D.D.C. 1996) (evidence of sex or race discrimination inadmissible in national origin discrimination case).

Whether one type of sex discrimination should be admissible in the trial of a different variety of sex discrimination may hinge on the individual circumstances. *See, e.g., Heyne*, 69 F.3d at 1480 (although sexual harassment of other female employees was inadmissible as to plaintiff's quid pro quo sexual harassment, such evidence should have been admitted as evidence of pretextual motive for discharge of plaintiff).

Termination/Disciplinary Action—Admissibility of Disparate Treatment

A plaintiff in a wrongful termination case may allege that other employees engaged in misconduct similar to that raised by the employer as the grounds for termination, thereby suggesting a pretextual reason for termination. The weight and even the admissibility of such evidence may hinge on the precise similarity of the misconduct in which other employees engaged. If the conduct is genuinely similar, admissibility may be obvious. However, where the allegedly similar misconduct is of a distinctly different nature, such misconduct may be irrelevant. *See, e.g., Meyer v. California and Hawaiian Sugar Co.*, 662 F.2d 637, 640 (9th Cir. 1981) (no disparate treatment where conduct of other employees was less egregious than plaintiff's conduct and person who terminated plaintiff was never aware of other employees' misconduct); *Chaboya*, 72 F.Supp.2d at 1092 (no disparate treatment where conduct of other employees was dissimilar).

Even if the misconduct is similar, an employee's prior disciplinary record may warrant disparate treatment. *See, e.g., Wall v. National R.R. Passenger Corp.*, 718 F.2d 906, 909 (9th Cir. 1983) (no disparate treatment where plaintiff had prior disciplinary record and other employees did not).

Progressive Discipline

A topic similar to but distinguishable from disparate discipline is progressive discipline. Cases involving progressive discipline issues frequently contain a claim that the con-

sequences for the misconduct should have been less drastic. Support for such a claim may be garnered from employee manuals. *See e.g. Huey v. Honeywell, Inc.*, 82 F.3d 332-33 (9th Cir. 1996) (when an employer issues a progressive discipline policy, publishes this policy in its manual and relies on its supervisors to relay this policy to its employees, the employer may not treat this policy as illusory); *Chaboya*, 72 F.Supp.2d at 1089 (employee was properly terminated after one incident because employee was an at-will employee, employee's conduct violated employer's code of conduct and employer's policies did not provide for progressive discipline); *Wagenseller v. Scottsdale Mem'l Hosp.*, 147 Ariz. 370, 382-83, 710 P.2d 1025, 1037-38 (1985) (if progressive discipline procedure modified the plaintiff-employee's at-will status, the employer could be held liable for failing to follow the procedure before terminating the plaintiff).

Wrongful Discharge—Lawsuit by Employee Terminated for Alleged Misconduct

Another evolving area of labor discrimination law involves litigation arising from the termination of an employee who allegedly engaged in discriminatory conduct against another employee. Management must decide whether to 1) discharge the alleged offender, thereby risking unfair termination of an employee and/or a lawsuit by that employee; or 2) decline or postpone taking action against the alleged offending employee, thereby permitting an intolerable situation to continue and/or risking a lawsuit by the target of the offending conduct. *Southwest Gas Corp. v. Vargas*, 111 Nev. 1064, 1079 n.5, 901 P.2d 693, 702 n. 5 (Nev. 1995) ("[C]harges of sexual harassment present significant problems to employers, not only in terms of their contractual relationship with their employees, but in terms of federal law under Title VII.").

One compelling issue currently being addressed in the courts is the standard of proof required by an employer before taking action against an employee who allegedly engaged in misconduct. A complicating factor arises when the employee is not an at-will employee.

An at-will employee may be fired for good cause or no cause but cannot be terminated for bad cause, that is, a cause "against public policy articulated by constitutional, statutory or decisional law." *Mack v. McDonnell Douglas Helicopter Co.*, 179 Ariz. 627, 629, 880 P.2d 1173, 1175 (App. 1994). "In Arizona, employment is presumed 'at-will' in the absence of a definite term of employment." *Woerth v. City of Flagstaff*, 167 Ariz. 412, 416, 808 P.2d 297, 301 (App. 1990). An at-will employee who is believed to have engaged in sexual harassment presumably may be terminated for alleged

misconduct.

A more difficult situation is presented where an employee is not at-will and may be dismissed only for good cause. There, the level of proof required for termination may be an issue.

Currently, there are two different standards in use: 1) the "good faith" standard articulated by the California Supreme Court in *Cotran v. Rollins Hudig Hall Int'l, Inc.*, 17 Cal.4th 93, 948 P.2d 412 (1998), and 2) the "actual guilt" standard applied by the Michigan Supreme Court in *Toussaint v. Blue Cross & Blue Shield*, 408 Mich. 579, 292 N.W.2d 880 (1980). It is not yet clear which standard will control in Arizona.

"Good-Faith" Standard

Under the "good-faith" standard, the question is whether the factual basis for discharge was "reached honestly, after an appropriate investigation and for reasons that are not arbitrary or pretextual." *Cotran*, 17 Cal.4th at 107, 948 P.2d 412 at 422. *Cotran* defined good-faith as "a reasoned conclusion...supported by substantial evidence gathered through an adequate investigation that includes notice of the claimed misconduct and a chance for the employee to respond." *Cotran*, 17 Cal.4th at 108, 948 P.2d 412 at 422. Although the "good-faith" standard gives deference to an employer's judgment, that judgment is reviewable. This reviewability protects an employee's contractual right to continued employment. *Southwest Gas Corp.*, 111 Nev. at 1075, 901 P.2d at 699-700.

The *Cotran* court did not attempt to describe the essentials of a sufficient investigation. *Cotran*, 17 Cal.4th at 108, 948 P.2d at 422. It stated that the adequacy of an employer's investigation should be determined on a case-by-case basis. *Id.* The court stated that there is no one correct method for conducting an investigation, provided both sides are afforded an opportunity to present their relative positions. *Id.*

"Actual Guilt" Standard

Under the "actual guilt" standard applied in *Toussaint*, an employee who may only be terminated for cause cannot be terminated unless he or she is actually guilty of the alleged misconduct upon which dismissal is based. *Toussaint*, 408 Mich. at 622, 292 N.W.2d at 896. Unlike the "good-faith" standard in which the reasonableness of the employer's decision is evaluated, the "actual-guilt" standard requires a determination as to the ultimate truth of the employee's alleged misconduct. *Id.* The "actual-guilt" standard has been criticized for interfering with managerial decision-making and for discouraging an employer's willingness to act. *Cotran*, 17 Cal.4th at 105-106, 948 P.2d at 420.

Conclusion

Employment discrimination cases in general, and sex discrimination cases in particular, are a significant share of the civil caseload in the District of Arizona. The case law in this area, particularly in sex discrimination cases, has developed in the past few years. In some respects, this case law has resolved previously unanswered questions; in other respects, new questions have arisen.

As this article dramatically reflects, answers are not as plentiful as questions.

Hon. John M. Roll *is a district judge for the district of Arizona. He is the chairperson for the Ninth Circuit Jury Committee.*

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